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In The

Supreme Court of the United States

October Term, 1995

Denise Chavez,

Cross-Petitioner,

v.

The University of Houston,
Arte Publico Press, & Nicolas Kanellos,

Cross-Respondents.

On Petition And Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the liberal system of "notice pleading" set up by the federal rules, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993), may a heightened pleading requirement be imposed in cases against individual government officials (especially where Congress has abolished immunity for individual government officials in cases of copyright or trademark infringement)?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 59 F.3d 539, and reprinted in Pet. App. A. The orders of the United States District Court for the Southern District of Texas are unreported and reprinted in Pet. Apps. B and C.

JURISDICTION

The court of appeals entered judgment on Aug. 1, 1995 and denied a timely petition for rehearing on Aug. 30, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The petition for writ of certiorari was docketed on Nov. 27, 1995. This conditional cross-petition is filed in reliance on Rule 12.5.

STATUTES INVOLVED

17 U.S.C. § 511(a) provides in part:

> . . . any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune . . . from suit . . . for a violation of any of the exclusive rights of a copyright owner. . . .

15 U.S.C. § 1122(a) provides in part:

> . . . any officer or employee of a State or instrumentality of a State acting in his or her official

capacity, shall not be immune . . . from suit . . . for any violation under this chapter.

RULE INVOLVED

Rule 8(a) of the Federal Rules of Civil Procedure provides in part: "A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."

STATEMENT

This is a copyright infringement case against a state university and one of its employees.

Cross-petitioner Denise Chavez is an author who made a contract with the University of Houston for publication of her books. Cross-respondent "Arte Publico Press," a publisher, is a constituent part of the university rather than a separate entity, and the university is an arm of the State of Texas. Cross-respondent Nicolas Kanellos, a university employee, is the person responsible for publishing operations by Arte Publico Press.

Chavez is the author and copyright owner of *The Last of the Menu Girls*. She agreed in a series of contracts that the university had exclusive rights to publish a certain number of copies of the work. A copyright dispute arose over whether the contract allowed the university to publish copies in excess of the agreed number. The university also published a collection of plays in a book called *Shattering the Myth*. A university catalog named her as

having chosen the plays to be included there. A dispute arose over the university's right to exploit her name and reputation.

Chavez filed suit in 1993 alleging (a) federal causes of action under the Copyright Act and the Lanham Act, and (b) state law causes of action. She sued the university and Mr. Kanellos. The district court had jurisdiction under the intellectual property laws and the supplemental jurisdiction statute. 28 U.S.C. §§ 1338, 1367(a). The university and its employee moved to dismiss on the grounds of immunity. The university claimed Eleventh Amendment immunity on the theory that a state university is the state itself; its employee, Mr. Kanellos, claimed qualified immunity.

The district court denied the motion to dismiss. Pet. App. A-21. The university and its employee appealed. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 689 (1993) (denial of Eleventh Amendment immunity is an appealable order); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (denial of qualified immunity is an appealable order). They argued that Congress lacks the power to override Eleventh Amendment immunity.

Because the appeal called into question the constitutionality of certain federal statutes that abrogate that immunity, the United States intervened on appeal. *See* 28 U.S.C. § 2403(a) (court "shall permit the United States to intervene"). The United States urged the court to uphold the statutes. Two amici curiae – The Authors Guild, Inc. and The Association of American Publishers, Inc. – filed briefs urging the same result.

The court of appeals affirmed in part and reversed in part. First, it upheld the statutes. It held that Congress'

abrogation of Eleventh Amendment immunity was constitutional. The university is therefore subject to suit under the Copyright Act and the Lanham Act. Pet. App. A-17. Second, it held that the university remains immune with respect to the state law causes of action. Pet. App. A-18. Finally, it held that the university employee is entitled to assert qualified immunity, and that the claims against him must be dismissed because they failed to satisfy a heightened pleading standard: "because plaintiff has failed to allege facts which would enable her to recover against Kanellos in his individual capacity, he is entitled to qualified immunity. *See Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985)." Pet. App. A-19.

This cross-petition challenges only the holding that a heightened pleading requirement would be imposed. There are additional facts that bear on the Eleventh Amendment issue, but they are not material to the question presented here.

REASONS FOR GRANTING THE WRIT

The question presented here – whether a "heightened pleading" requirement may be imposed in cases against individual government officials – is an important issue of federal procedure which recurs frequently. There are several reasons for granting the writ: (1) this Court has left this question open, (2) this Court has actually granted review on the question in the past, (3) the circuits take conflicting approaches to the question, and (4) Congress has abolished immunity in cases of copyright or trademark infringement. At any rate, if the Court is going to

decide the Eleventh Amendment issue, it would make sense to decide the heightened pleading question at the same time.

1. This Court has reserved the question in the past.

In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993) the Court rejected a "heightened pleading" requirement. The Court held that it was "impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 1163. But since the defendant happened to be a municipality rather than an individual, the Court confined its holding to suits against municipalities, thus reserving the question whether the Court's "qualified immunity jurisprudence would require a heightened pleading in cases involving individual governmental officials." *Id.* at 1162. This case offers an opportunity to reach the question that *Leatherman* reserved.

2. This Court has actually granted certiorari on the question in the past.

The Court has twice granted review on this question. In *Siegert v. Gilley*, 111 S. Ct. 1789 (1991) the issue was raised in one of the questions presented but the case was decided on other grounds. *See id.* at 1796-97 (Marshall, J., dissenting) (quoting the questions presented). Last Term, in *Kimberlin v. Quinlan*, 115 S. Ct. 2552 (1995) the issue came up again for plenary review but no decision on the merits resulted. After oral argument, the Court vacated

and remanded *Kimberlin* for reconsideration in light of the later decision in *Johnson v. Jones*, 115 S. Ct. 2151 (1995). What *Leatherman* left open remains undecided, and the need for a decision from this Court has only grown. This case offers an opportunity to complete the unfinished business of determining whether a heightened pleading standard may ever be imposed.

3. The circuits take conflicting approaches to the question.

After *Leatherman*, it is hard to see how a heightened pleading standard could ever be proper. The court of appeals, however, held that under its own pre-*Leatherman* precedents, heightened pleadings were still required in cases against individuals. *See* Pet. App. at A-19 (relying on *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985)). The court has made the same holding in several other post-*Leatherman* cases. *See, e.g, Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994).

This approach conflicts with that of the Seventh Circuit: "As the Supreme Court recently has made very clear, there is no heightened pleading requirement for civil rights actions." *Baxter v. Vigo County School Corp.*, 26 F.3d 728, 734 (7th Cir. 1994); *see Palmer v. Board of Education*, 46 F.3d 682, 688 (7th Cir. 1995) (school desegregation suit against individual officials: court holds that there is no heightened pleading requirement); *Black v. Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994) (suit against individual officials: court holds that there is no heightened pleading requirement in any § 1983 suits); *see also Billman v. Indiana Dep't of Corrections*, 56 F.3d 785, 790 (7th Cir. 1995) (dictum:

heightened pleading requirements are "of highly doubtful propriety after *Leatherman*"). As Chief Judge Posner has repeated in dictum:

> The Federal Rules of Civil Procedure do not require the plaintiff to plead the particulars of his claim, Fed.R.Civ.P. 8(a)(1) with the exceptions (of which the best known is fraud) listed in Rule 9(b). *Early v. Bankers Life & Casualty Co.*, 959 F.2d 75, 79 (1992). A nascent movement to add judge-made exceptions to those listed in Rule 9(b), well described in *Boston & Maine Corp. v. Town of Hampton*, 987 F.2d 855, 862-64 (1st Cir. 1993), was scotched by the Supreme Court in *Leatherman*.

Hammes v. AAMCO Transmissions, 33 F.3d 774, 778 (7th Cir. 1994). The Seventh Circuit has even applied *Leatherman* to a case brought under the statute involved here. *See Mid America Title Co. v. Kirk*, 991 F.2d 417, 421-22 (7th Cir. 1993) (copyright case: no heightened pleading standard).

For all the various fact patterns in the Seventh Circuit cases, one thing is clear: had these exact facts arisen in the Seventh Circuit instead of the Fifth Circuit, the outcome would have been ***precisely contrary*** to the one reached here.

We concede that the Seventh Circuit holds the minority view. Most circuits mechanically follow pre-*Leatherman* precedents and insist on heightened pleadings. These courts acknowledge *Leatherman*, but they excuse their anti-*Leatherman* stance as required by circuit precedent. *See Edgington v. Missouri Dep't of Corrections*, 52 F.3d 777, 779 n.3 (8th Cir. 1995) (heightened pleading "remains the governing law of this circuit"); *Branch v. Tunnell*, 14 F.3d

449, 456 (9th Cir.) ("we lack authority to reconsider" circuit precedent requiring heightened pleading), *cert. denied*, 114 S. Ct. 2704 (1994); *Kimberlin v. Quinlan*, 6 F.3d 789, 794 n.9 (D.C. Cir. 1993) (heightened pleading "remains the governing law of this circuit"), *reh'g en banc denied*, 17 F.2d 1525 (1994), *rev'd on other grounds*, 115 S. Ct. 2552 (1995). Writing for the Seventh Circuit, Judge Easterbrook has called the D.C. Circuit's holding in *Kimberlin* "inconsistent with this circuit's position." *Palmer*, 46 F.3d at 688.

4. Congress has abolished all immunity for cases of copyright or trademark infringement.

Applying a heightened pleading standard here would seem anomalous since Congress has decreed that there shall be ***no*** immunity at all for a person who is sued for copyright or trademark infringement. 15 U.S.C. § 1122(a); 17 U.S.C. §§ 501(a), 511(a). Respondent Kanellos simply has no immunity. If he has no immunity, there is no basis for imposing a heightened pleading standard. The court of appeals, however, ignored the plain language of the statutes.

This cross-petition is conditioned on the granting of the petition on the Eleventh Amendment issue.

CONCLUSION

If the petition is granted, this cross-petition should also be granted.

Respectfully submitted,

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